1	IN THE SUPREME COURT OF THE UNITED STATES
2	x
3	SONNY PERDUE, GOVERNOR OF :
4	GEORGIA, ET AL., :
5	Petitioners :
6	v. : No. 08-970
7	KENNY A., BY HIS NEXT FRIEND :
8	LINDA WINN, ET AL. :
9	x
10	Washington, D.C.
11	Wednesday, October 14, 2009
12	
13	The above-entitled matter came on for oral
14	argument before the Supreme Court of the United States
15	at 11:10 a.m.
16	APPEARANCES:
17	MARK H. COHEN, ESQ., Atlanta, Ga.; on behalf of the
18	Petitioners.
19	PRATIK A. SHAH, ESQ., Assistant to the Solicitor
20	General, Department of Justice, Washington,
21	D.C.; on behalf of the United States, as amicus
22	curiae, supporting the Petitioners.
23	PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf of
24	the Respondents.
25	

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1	PROCEEDINGS
2	(11:10 a.m.)
3	CHIEF JUSTICE ROBERTS: We will hear
4	argument next in Case 08-970, Perdue v. Kenny A.
5	Counsel.
6	ORAL ARGUMENT OF MARK H. COHEN
7	ON BEHALF OF THE PETITIONERS
8	MR. COHEN: Mr. Chief Justice, and may it
9	please the Court:
10	Plaintiff's counsel in this case earned a
11	large fee award based on prevailing market hourly rates
12	and a substantial number of hours expended.
13	However, the district court determined that
14	the \$6 million lodestar was insufficient to compensate
15	them for the quality of their representation or their
16	results obtained.
17	This Court has previously held that factors,
18	such as novelty and complexity of the issues,
19	contingency, and superior performance cannot be used to
20	increase the lodestar amount because the factors are
21	subsumed within that determination.
22	But because of this Court's indication that,
23	in rare or exceptional circumstances, upward adjustments
24	may be permissible, district courts, such as the one
25	below, have used quality and results to increase

- 1 lodestar awards, even though the -- the multiplication
- 2 of the reasonable number of hours expended times the
- 3 reasonable hourly rate constitutes a fully compensatory
- 4 fee and serves the purpose of the statute, which is to
- 5 attract competent counsel without providing a windfall.
- 6 Now, with respect to quality of
- 7 representation, that normally involves two factors:
- 8 Skill and experience of the attorney; and also the
- 9 effort it takes to succeed in the case.
- 10 In this case, the lead counsel submitted
- 11 affidavits indicating that they sought hourly rates that
- 12 were within the prevailing market rates in the Atlanta
- 13 market; and, in fact, lead counsel's market rate, the
- 14 court found, was in the upper end of that market.
- 15 When the district court determined --
- 16 JUSTICE SOTOMAYOR: I'm sorry. Could you
- 17 repeat what the market was? Was it the market for all
- 18 attorneys or only for attorneys doing this type of work?
- 19 MR. COHEN: It was the market for attorneys
- 20 with similar skill or experience doing similar work as
- 21 these counsel did. So what the court --
- JUSTICE SCALIA: What is similar -- what is
- 23 similar work?
- 24 MR. COHEN: Similar work would be Federal
- 25 court work, where you -- involving class actions, for

- 1 example. But the focus is mostly on the skill and
- 2 experience and reputation of the attorney.
- JUSTICE SCALIA: Okay.
- 4 MR. COHEN: What the court did in this case,
- 5 though, was, rather than take those hourly rates, which
- 6 were prevailing, which the record was clear were
- 7 prevailing, the court determined the quality factor
- 8 justified an increase because they advanced case
- 9 expenses, because they were not paid on an ongoing
- 10 basis, and because their fees were contingent upon the
- 11 success of the case.
- 12 JUSTICE SCALIA: Well, that has nothing to
- 13 do with the -- with the quality of the representation,
- 14 does it?
- 15 MR. COHEN: No, it doesn't, Your Honor.
- 16 JUSTICE SCALIA: Why didn't it name those
- 17 factors as -- as the determinative factors, instead of
- 18 saying, and therefore they should get more money for
- 19 quality?
- MR. COHEN: Well, for whatever reason, the
- 21 court determined to use contingency-related factors to
- increase the fee award based on the quality factor.
- JUSTICE SCALIA: Okay. They advanced --
- 24 they advanced money for experts --
- MR. COHEN: Correct.

1	JUSTICE SCALIA: during the case. The
2	contingency, which we rejected as a as a basis.
3	And what was the third one?
4	MR. COHEN: And the third one was that they
5	weren't paid on an ongoing basis.
6	JUSTICE SCALIA: They weren't paid on
7	MR. COHEN: That's right. But that is not
8	a rare
9	JUSTICE SCALIA: Isn't that isn't that
10	the same as contingency?
11	MR. COHEN: Yes, it is, Your Honor, and it's
12	not a rare or exceptional circumstance when you're
13	talking about a fee-shifting statute.
14	JUSTICE GINSBURG: Mr. Cohen, I thought this

- 15 judge, Judge Shoob, said: These lawyers were amazingly
- 16 good; I have never seen a better performance. So don't
- 17 we take him at his word? I mean, he certainly talked
- 18 about the quality of the performance of these lawyers.
- MR. COHEN: He did say that they exhibited
- 20 the best skill and professionalism, Justice Ginsburg,
- 21 that he had seen in his time on the bench.
- JUSTICE GINSBURG: Yes.
- MR. COHEN: But I would submit to you that
- 24 that is not a reason to enhance the lodestar because --
- JUSTICE SOTOMAYOR: How about you get a

- 1 second-year associate whose billing rate for two years'
- of experience is \$200, and a partner's rate is \$500, and
- 3 a judge says: This individual didn't perform like a
- 4 2-year associate; he did the quality and kind of work of
- 5 someone far superior in years in skill and experience.
- That would not, under your argument, entitle
- 7 the Court to give an enhancement?
- 8 MR. COHEN: No, it wouldn't, Your Honor,
- 9 because, if that \$200 an hour associate was doing other
- 10 work for other clients, the bill would be for \$200 an
- 11 hour, regardless of what the result would have been or
- 12 how good that associate would have been.
- 13 It's basically --
- 14 JUSTICE GINSBURG: Mr. Cohen, you said in
- 15 your brief that, in such a case, the prevailing party
- 16 could argue that counsel should obtain a higher hourly
- 17 rate in the litigation than the customary rate he or she
- 18 charges in other cases, and that's the situation Justice
- 19 Sotomayor inquired about.
- 20 But that sounds to me -- you take the
- 21 second-year associate, pay him at the rate of the top
- 22 partner because her performance was so outstanding.
- 23 That is an enhancement, but it isn't as transparent as
- 24 the one that Judge Shoob gave.
- 25 But your -- this suggestion -- maybe you are

- 1 going to retreat from it -- said it would be appropriate
- 2 to take the second-year associate and pay at a higher
- 3 hourly rate than the customary rate for that associate.
- 4 MR. COHEN: What I meant by that position in
- 5 the brief, Your Honor, was that, in presenting
- 6 affidavits to support the hourly rate of that associate,
- 7 that associate may present hourly affidavits that the
- 8 rate was between \$200 and \$300 per hour and the judge
- 9 could determine, because of how good he did, I'm going
- 10 to give him at the upper end of that market.
- 11 JUSTICE SOTOMAYOR: But you haven't dealt
- 12 with my hypothetical. He didn't perform like a
- 13 second-year associate. He performed like a 15-year
- 14 lawyer. The difference is not with respect to skill and
- 15 experience. It's with respect to performance.
- 16 And so what Justice Ginsburg was asking is,
- 17 what you are basically saying, the quality of that
- 18 representation, even though it reflected more than the
- 19 market one would look at objectively on the basis of the
- 20 years of experience, that judge can't enhance, even
- 21 though someone performed far above whatever else the
- 22 market would consider his or her skills at the moment.
- MR. COHEN: Well, remember, Your Honor,
- 24 that, when the statute was enacted, it was said in the
- 25 congressional reports that they wanted to compensate for

- 1 the expenditure of time and to reimburse the plaintiff,
- 2 if you will, for what the plaintiff put out in terms of
- 3 expenses and fees.
- Well, if you are -- if you are going to
- 5 basically treat that second-year associate as a 15-year
- 6 partner and award him a \$500 an hour rate, what you are
- 7 actually doing is overcompensating that person for what
- 8 the expenditure of time was and for what the actual fee
- 9 they would have charged to their client was.
- 10 JUSTICE SCALIA: Well, I suppose the
- 11 question under the statute is whether it would be a
- 12 reasonable attorney's fee, and I guess one way to
- 13 determine that is to ask whether it would be considered
- 14 reasonable if a law firm that billed a client according
- 15 to their regularly hourly rates came in and said, but
- 16 we're going to kick it up another -- you know, another
- 17 \$10,000 because this -- this second-year associate, boy,
- 18 he's a whiz, and he performed like a senior partner. So
- 19 we are going to -- we are billing him at the \$500 rate,
- 20 instead of the \$200. Would -- would that be considered
- 21 a reasonable attorney's fee?
- MR. COHEN: No, it wouldn't, and no
- 23 reasonable law firm would do that, which is why a judge
- 24 would be beyond his discretion -- or her discretion --
- 25 JUSTICE SOTOMAYOR: That's not true. Law

- 1 firms get bonuses from clients all the time. They get
- 2 negotiated. Some of the amici gave examples of what's
- 3 happening in -- what happens in the marketplace.
- 4 MR. COHEN: But those are private agreements
- 5 that are entered into with the client.
- JUSTICE SOTOMAYOR: So why can't the judge
- 7 determine a reasonable fee in the same way the market
- 8 does? Which is --
- 9 MR. COHEN: That's not the -- I'm sorry.
- 10 That is not the traditional market, Your Honor. The
- 11 traditional market is the hourly rate that is envisioned
- 12 by the lodestar. We don't replicate all possible
- 13 private fee agreements into fee-shifting statutes.
- 14 That's what this Court has said.
- 15 JUSTICE SOTOMAYOR: No, but the -- but the
- 16 Congress didn't use the per-hour lodestar --
- MR. COHEN: No.
- 18 JUSTICE SOTOMAYOR: -- as the method. If
- 19 that's all it wanted it could have, and there were
- 20 suggestions that it consider limiting the -- the award
- 21 to just the lodestar calculation. So obviously Congress
- 22 was thinking of something broader than just that.
- MR. COHEN: Well, Congress was --
- JUSTICE SOTOMAYOR: That part of the market
- anyway.

Τ	MR. COHEN: I'm sorry.
2	Congress also was not thinking of
3	replicating all possible private fee arrangements
4	because they also indicated that the the amount of
5	the fee should not be dependent on a proportion of the
6	damage award.
7	JUSTICE SOTOMAYOR: Well, but that's why we
8	have held in our cases that it should be a rare and
9	exceptional circumstance. The difference that we are
0	engaged in is whether the quality of performance can
1	ever constitute that rare exception that would justify a
_2	district court saying, you performed greater than what
_3	the market would have valued you at before your
_4	performance. That's really what the issue is.
.5	MR. COHEN: Well, that's in answer to
-6	your hypothetical, again, in the market where you have
_7	an hourly rate for an associate, that is the hourly rate
_8	that that client is going to be billed by that law firm,
_9	and they are not going to have a results fee or a bonus
20	fee because that attorney happened to do better. The
21	hourly rates
22	CHIEF JUSTICE ROBERTS: Counsel, this
23	this brilliant second-year associate we are talking
24	about, the way these submissions to the Court are the
25	way they're presented, do they carve out her

- 1 contribution to a particular filing? To the extent I
- 2 have looked at them they have something like, you know,
- 3 draft motion to dismiss, and the associate has 40 hours
- 4 and the junior partner has 10 hours and the senior
- 5 partner has 5 hours dedicated to that.
- I mean, if the associate is doing -- in the
- 7 hypothetical, is doing work at the partner level, how do
- 8 you know that the brilliance isn't contributed by the 4
- 9 hours of the partner rather than the 40 hours of the
- 10 associate?
- 11 MR. COHEN: You don't in the traditional way
- 12 of billing that you are talking about.
- JUSTICE SCALIA: Or indeed, you don't know
- 14 that the brilliance of the second-year associate enables
- 15 the \$500-an-hour partner to spend less time on the
- 16 matter. Presumably it does. It's so great when it
- 17 comes to him, he doesn't have to do much work.
- 18 MR. COHEN: Well, that's true, Your Honor.
- 19 The other thing to point out is that when the
- 20 submissions are made to the court they are supposed to
- 21 be broken down by tasks actually, and here the district
- 22 court considered the submissions not by what lawyer did
- 23 what task, but how many hours were expended on
- 24 individual tasks.
- 25 And when the court determined to actual

- 1 lower the amount because of excessive hours they looked
- 2 at tasks and said, for summary judgment, for example,
- 3 too many hours were expended. So the court doesn't
- 4 normally look at lawyer doing particular tasks. It
- 5 looks at tasks being done by the lawyers in general.
- 6 JUSTICE KENNEDY: It's -- it's not clear to
- 7 me what the district judge should do in making the
- 8 lodestar calculation when he considers quality of
- 9 performance. I guess you are saying -- I think maybe
- 10 you have already said -- that he can consider quality
- 11 of performance, but only within the confines of what is
- 12 a reasonable rate.
- MR. COHEN: That's correct, Your Honor.
- 14 JUSTICE KENNEDY: Because the brief for the
- 15 Respondent said: Well, you know, you are really
- 16 counting this at the front end, and if you can do that,
- 17 why not put it in at the back end? And I'm just having
- 18 problems with that still. Suppose the judge at the
- 19 outset said: This quality of performance is so good
- 20 that, so far as the lodestar is concerned, I think a
- 21 reasonable fee is above the usual hourly rate.
- 22 MR. COHEN: Well, I would submit, though,
- 23 that when the judge decides how to do the lodestar rate,
- 24 he is looking at the affidavits, talking about what the
- 25 range of the market is for that area. He's also looking

- 1 at the number of hours reasonably expended.
- 2 JUSTICE KENNEDY: But -- so in computing the
- 3 lodestar rate he cannot consider the quality of
- 4 performance?
- 5 MR. COHEN: Quality of performance is built
- 6 within, I would say subsumed within, the hourly rate and
- 7 the number of hours expended, as this Court has said in
- 8 Delaware Valley I.
- JUSTICE KENNEDY: Well, then it seems to me
- 10 you're saying that he does not look to actual quality of
- 11 performance. He just looks to market rates without
- 12 reference to that. I -- I --
- MR. COHEN: Well, but --
- JUSTICE KENNEDY: That's why I'm having --
- 15 I'm -- I mean, you know, the question presented is -- is
- 16 just quality of performance and result obtained; that's
- 17 all we're talking about?
- 18 MR. COHEN: Correct. And --
- 19 JUSTICE KENNEDY: And I don't see why that
- 20 can't be considered as part of the lodestar, and if it
- 21 can be, then I don't see what the argument is about.
- 22 MR. COHEN: But superior performance is just
- 23 the reason that hourly rates are what they are. That's
- 24 what this Court said in Pierce v. Underwood.
- JUSTICE GINSBURG: Not necessarily --

- 1 JUSTICE STEVENS: But does that -- does that
- 2 mean that the fee would be the same under the lodestar
- 3 whether the lawyer won or lost?
- 4 MR. COHEN: Well, no. The -- the lawyer
- 5 doesn't get a fee in a fee-shifting statute if he loses.
- 6 JUSTICE STEVENS: But if for some reason, if
- 7 you did had some reason to calculate it, theoretically
- 8 it would be the same fee as if he had lost?
- 9 MR. COHEN: That's correct, that's correct.
- 10 JUSTICE STEVENS: And so the quality of
- 11 performance really is totally irrelevant.
- MR. COHEN: As it is for the normal lawyer
- 13 working on a private matter for a client.
- 14 JUSTICE STEVENS: Right.
- 15 MR. COHEN: They get paid an hourly rate and
- 16 it's win or lose, and what the judge tried to do here is
- 17 to say, well, I need to give them a little extra because
- 18 their winning this case was dependent upon a
- 19 contingency, and the factors that he built into that
- 20 enhancement were contingency-related factors.
- 21 JUSTICE GINSBURG: We are going back to the
- 22 judge, who did say that this was the best performance he
- 23 ever saw. So I can't credit just that it was just
- 24 contingency.
- 25 But, first, you have clarified that what you

- 1 said in your brief meant only the top range for a lawyer
- 2 of this period. So this is more limited than -- than
- 3 one might take it to be.
- In some circuits, like the D.C. Circuit, the
- 5 rate is set by the number of years that the person is
- 6 out of law school and there isn't any flexibility. I
- 7 mean, you give the 1-year associate so much, the 5-year
- 8 associate so much. So how in a system like that could
- 9 you take into account quality at all?
- 10 MR. COHEN: Well, but in the normal system,
- 11 Your Honor -- and I would ask to reserve some time for
- 12 rebuttal -- that that hourly rate that that first-year
- or second-year associate gets is the rate that they bill
- 14 their clients. They don't adjust it afterwards unless
- 15 they have a special fee arrangement, as -- as Justice
- 16 Sotomayor said. They don't adjust it when they send the
- 17 final bill in and they say: This associate is the best,
- 18 did the best work that you have ever seen, and we're
- 19 going to increase that hourly rate exponentially because
- 20 of that work. That's not the market with respect to
- 21 billable rates.
- 22 CHIEF JUSTICE ROBERTS: Thank you, counsel.
- MR. COHEN: Thank you.
- 24 CHIEF JUSTICE ROBERTS: Mr. Shah.
- 25 ORAL ARGUMENT OF PRATIK A. SHAH

Τ	ON BEHALF OF THE UNITED STATES,
2	AS AMICUS CURIAE,
3	SUPPORTING THE PETITIONERS
4	MR. SHAH: Mr. Chief Justice, and may it
5	please the Court:
6	Section 1988 permits reasonable attorney's
7	fees. That means going above and beyond the lodestar
8	amount can be justified only if the lodestar is
9	unreasonably low. We submit that a lodestar based on
10	prevailing market rates does not require a performance
11	bonus on top of the lodestar to make an award
12	reasonable.
13	JUSTICE SCALIA: You are saying we can never
14	exceed the lodestar amount? I mean, we have said in
15	some cases that in extraordinary circumstances it can.
16	What are those extraordinary circumstances, or do you
17	think there are none?
18	MR. SHAH: There are none for attorney
19	performance, Your Honor. There may be circumstances
20	JUSTICE SCALIA: Such as? That's what I'm
21	asking.
22	MR. SHAH: Right.
23	JUSTICE SCALIA: What are you referring to
24	if not attorney performance?
25	MR. SHAH: Right. The government sets out

- 1 one example in our brief of where we think an upward
- 2 enhancement might be appropriate, and that is where an
- 3 attorney takes on a particularly unpopular client or
- 4 cause that causes some external harm, external to the
- 5 case, to his practice or income.
- 6 CHIEF JUSTICE ROBERTS: But it's one of the
- 7 outstanding traditions of the bar that lawyers are
- 8 expected to do that in the normal course, so why would
- 9 that be a special circumstance?
- 10 MR. SHAH: Well, Your Honor, I think that
- 11 circumstance is much more closely tied to the statutory
- 12 purpose of section 1988, which is to attract competent
- 13 counsel in --
- 14 CHIEF JUSTICE ROBERTS: Well, how do you
- 15 tell -- how do you tell whether a client is popular or
- 16 unpopular? I mean, a lot of unpopular clients in the
- 17 abstract sense are in fact -- they have a lot of support
- 18 in the community. I suppose one of the more unpopular
- 19 clients these days is a Wall Street banker. But I mean,
- 20 you wouldn't say -- you wouldn't suggest that law firms
- 21 charge more when they represent them?
- MR. SHAH: No, Your Honor. I think what our
- 23 -- what our enhancement would allow for, even if you
- 24 can't make the ex ante determination that taking on this
- 25 representation is going to cause me some special harm;

- 1 that is, all my clients will leave my firm if I take on
- 2 this case. Even if you don't know that before the fact,
- 3 the fact that there is an ability for the court to give
- 4 you an enhancement when that occurs -- remember this is
- 5 done after, after the case is already complete is when
- 6 the fear -- fee hearing determination is made. The
- 7 ability of a court to give that sort of compensation
- 8 would provide insurance or guarantee to the attorney
- 9 before they take on a case that if it turns out badly
- 10 that -- that they will still get compensated.
- 11 JUSTICE SCALIA: You think that is what we
- 12 had in mind, huh? You think that is what we had in mind
- when we said they are extraordinary circumstances?
- MR. SHAH: Well -- well, Your Honor, I --
- 15 JUSTICE SCALIA: I think it's very
- 16 imaginative, but I would never --
- 17 (Laughter.)
- 18 JUSTICE SCALIA: -- but I never would have
- 19 thought of it, and I doubt whether we did.
- 20 (Laughter.)
- 21 MR. SHAH: Well, it is -- Your Honor, it is
- one of the ten -- one of the Johnson factors set forth,
- 23 so it's not coming out of thin air. And I think it
- 24 is --
- 25 JUSTICE GINSBURG: Is there another example?

- 1 I mean, you -- you are saying the rule isn't never, it
- 2 is sometimes. And you have given us one sometimes. Is
- 3 there any other --
- 4 MR. SHAH: Your Honor, that is the only one
- 5 that I think is left after this Court's fee-setting
- 6 jurisprudence over the last 25 years. It's consistently
- 7 knocked down other bases for an enhancement such as
- 8 complexity of issues, novelty of issues, contingency
- 9 risks, delayed payment. All of those other grounds of
- 10 potential enhancements that the legislative history
- 11 refers to have been categorically prohibited by this
- 12 Court's jurisprudence. I think that --
- 13 JUSTICE GINSBURG: How about a downward
- 14 adjustment? You have the hourly rate, the number of
- 15 hours, and the judge, after trimming the hours, then
- 16 says: This has been a case, even though they prevailed,
- 17 the lawyer wasn't prepare; I am not going to give the
- 18 hourly rate. Can a judge adjust the lodestar down for
- 19 poor performance?
- 20 MR. SHAH: Your Honor, I think the limited
- 21 circumstances which allow for a downward adjustment
- 22 would be those set forth in this Court's decision in
- 23 Hensley. I don't think that poor performance alone
- 24 would justify a downward departure --
- JUSTICE GINSBURG: Hensley is you lost on an

- 1 issue, so you don't get paid for --
- 2 MR. SHAH: Right. So if there were certain
- 3 claims that the poor performance led -- led the
- 4 plaintiff to be unsuccessful on certain claims but not
- 5 all the claims, I think a downward departure would be
- 6 appropriate.
- 7 JUSTICE GINSBURG: But the plaintiff -- the
- 8 plaintiff prevailed on everything, just that the judge
- 9 said this was a really poor, poor performance.
- 10 MR. SHAH: No, Your Honor, I don't think a
- 11 downward departure would be appropriate in that
- 12 circumstance, because that's what the prevail -- the
- 13 prevailing market would not allow for a downward
- 14 departure. Normally --
- 15 JUSTICE STEVENS: Even if the judge found as
- 16 a fact that this lawyer spent 50 hours doing what any
- 17 good lawyer could do in 5 hours?
- 18 MR. SHAH: Well -- well, Your Honor, that
- 19 would be taken care of in the setting of the lodestar
- 20 rate. Remember there are two components --
- 21 JUSTICE STEVENS: I don't -- I don't see how
- 22 that is set forth in the lodestar rate.
- MR. SHAH: Well, it -- not in the lodestar
- 24 rate, but in the number of reasonable -- there are two
- 25 components to the lodestar calculation, the number of --

- 1 number of hours reasonably spent on the matter and the
- 2 reasonable hourly rate.
- 3 The situation you posit would be addressed
- 4 by a downward adjustment of the number of hours
- 5 reasonably spent working on the case. If the judge made
- 6 a determination that any competent lawyer could have
- 7 done this in 10 hours, he would not credit 50 hours of
- 8 work. And that's -- that's -- that's how that situation
- 9 would be taken care of.
- 10 JUSTICE KENNEDY: For extraordinary
- 11 circumstances, what about a very, very popular cause and
- 12 he wins and they are beating his door down? Can we
- 13 reduce it for that?
- 14 (Laughter.)
- MR. SHAH: No, Your Honor, that would not
- 16 require a reduction. That would be an extra award for
- 17 the attorney taking on that type of --
- 18 JUSTICE SCALIA: Well, I mean, what is sauce
- 19 for the goose is sauce for the gander.
- 20 (Laughter.)
- 21 JUDGE SCALIA: I mean, if -- if you get
- 22 rewarded for unpopularity, you ought to be get penalized
- 23 for popularity.
- 24 (Laughter.)
- 25 JUDGE SCALIA: You got a lot more clients

- 1 because of this case.
- 2 MR. SHAH: Well, Your Honor, I don't think
- 3 there is any basis in the -- in the private market for
- 4 that sort of downward adjustment.
- 5 Justice Sotomayor, if I can address your
- 6 concern about these alternative arrangements that --
- 7 that occur in -- that are starting to emerge, at least
- 8 as Respondent suggest in their brief to this Court by
- 9 citing a few newspaper articles and the proverbial word
- on the street that these are an emerging trend.
- 11 First of all, there is no -- absolutely no
- 12 evidence in the record in this case that those type of
- 13 arrangements were available in the relevant market. But
- 14 even if there were, those sort of alternative
- 15 arrangements are essentially modified contingency
- 16 arrangements. And this is made most clear in
- 17 Respondents' own amicus brief, the brief of the law and
- 18 economic scholars. And this is at page 10 and 11 of
- 19 their brief.
- They call these partial contingency or
- 21 hybrid contingency arrangements. It's not the same
- 22 standard hourly rate and then a client decides to throw
- 23 in a kicker of a million dollar bonus. Rather, these
- 24 are discounted rates with a success bonus, essentially a
- 25 modified form of contingency arrangement. They are

- 1 prohibited for exactly the same reasons that this Court
- 2 prohibited a contingency risk enhancement in Dague. The
- 3 same reasons would prohibit relying on those sort of
- 4 alternative arrangements to provide an attorney
- 5 enhancement for performance.
- 6 JUSTICE SOTOMAYOR: One of the purposes of
- 7 Congress -- one of the purposes of Congress was to
- 8 ensure that litigants under these fee-shifting statutes
- 9 could attract competent counsel, correct?
- MR. SHAH: Yes, Your Honor.
- 11 JUSTICE SOTOMAYOR: If the market doesn't
- 12 give them attorneys to start with because there are so
- 13 many risks involved in this process and it sets a
- 14 reduced fee because of those risks, how do you attract
- 15 competent counsel? How do you attract counsel that is
- 16 better than the norm in that field to pursue as private
- 17 attorney generals cases that Congress has determined are
- 18 worthy of being pursued, unless you have a quality
- 19 adjustment factor?
- MR. SHAH: Two responses, Your Honor.
- 21 First, the problem that you posit about attorneys
- 22 having -- being deterred by having to absorb, you know,
- 23 the -- the upfront outlay of significant expert expenses
- 24 or to having absorbed the contingency risks, those are
- 25 problems created by this Court's precedent in Dague, not

- 1 before this Court now.
- JUSTICE SOTOMAYOR: That doesn't mean Dague
- 3 was right; right?
- 4 MR. SHAH: Well, Your Honor, no one has
- 5 asked --
- 6 JUSTICE SOTOMAYOR: You're here arguing a
- 7 different point?
- 8 MR. SHAH: No one in this case has asked the
- 9 Court to revisit Dague.
- 10 But more -- more to the point of your
- 11 question, the type -- even accepting Respondents'
- 12 formulation of this enhancement, it would only be
- 13 available in the rare and exceptional case. And no
- 14 reasonable attorney making an ex ante determination to
- 15 whether to take on a representation would rely on the
- 16 speculative and remote possibility that the district
- 17 judge is going to have found this to be one of the best
- 18 cases he has ever seen in making that calculation.
- 19 Respondents' own numbers suggest that these
- 20 are granted less than one time -- once a year. That
- 21 suggests that no reasonable attorney would take that
- 22 into consideration and it does it not, in fact, further
- 23 the statutory purpose in that event of attracting
- 24 competent counsel.
- I would like to make one last point, and

- 1 this is to bring us back to the facts of this case. I
- 2 think Respondents' own trial counsel, the discussion
- 3 that they give of the lodestar rates used in this case I
- 4 think is particularly telling. And this is the
- 5 affidavit of Marcia Lowry, who is the lead plaintiffs'
- 6 trial counsel, and this was submitted during the fee-
- 7 setting hearing, and the relevant excerpts appear on
- 8 page 41 of the Joint Appendix. And I want to read from
- 9 paragraph 25, and here's what she has to say about the
- 10 rates used by the court:
- 11 "The standard hourly rates reflected in
- 12 Exhibit 2" -- and those are the rates used by the
- 13 district court -- "are fair, reasonable and consistent
- 14 with the hourly rates in the Atlanta market for the
- 15 price of legal services of comparable quality rendered
- 16 in cases demanding similar skill, judgment, and
- 17 performance."
- 18 Now, the affidavit goes on to say that the
- 19 rates are still too low for the other factors that
- 20 Mr. Cohen discussed -- contingency risks, delayed
- 21 payment, expert fees -- but not for attorney
- 22 performance.
- 23 CHIEF JUSTICE ROBERTS: Thank you, counsel.
- MR. SHAH: Thank you, Your Honor.
- 25 CHIEF JUSTICE ROBERTS: Mr. Clement.

1	ORAL ARGUMENT OF PAUL D. CLEMENT
2	ON BEHALF OF THE RESPONDENTS
3	MR. CLEMENT: Thank you, Mr. Chief Justice,
4	and may it please the Court:
5	Let me begin with the colloquy that involved
6	Justices Ginsburg and Justice Kennedy about the rates
7	and whether you can have sort of pre-enhanced rates as
8	part of the lodestar or whether you can only do the
9	enhancement after the fact.
0	At the end of the day, as long as it is
1	established in this case that you can have an
_2	enhancement for quality, I suppose that my my clients
_3	would be satisfied. The point is, though, that the
_4	preexisting law in the Eleventh Circuit and most
.5	circuits does not allow for a pre-enhanced rate to be
_6	used to calculate the lodestar. They are either done
_7	completely mechanically, as Justice Ginsburg suggests
-8	the Laffey index in the D.C. Circuit, or they are done
_9	through a simple calculation of the prevailing market
20	rates.
21	JUSTICE ALITO: But sometimes there is a
22	great advantage in doing things mechanically, because
23	it it provides an element of fairness. And I will
24	tell you what troubles me about this, and maybe you can
5	convince me that I shouldn't be troubled by it Here

- 1 the district judge in effect takes four plus million
- 2 dollars from the taxpayers of Georgia and -- and awards
- 3 it above the lodestar calculation to these attorneys and
- 4 says -- and I -- I certainly take him at his word --
- 5 this was the best performance I have seen in 28 years.
- 6 But it seems totally standardless, and I see no way of
- 7 policing it, and I see a great danger that trial judges
- 8 are going to use this as a way of favoring their
- 9 favorite nonprofit foundation or their favorite cause or
- 10 their favorite attorneys, because they think they
- 11 generally do good work.
- 12 And this is not -- this is not like private
- 13 litigation where the money is coming out of the pocket
- 14 of a corporation. It's coming out of the pocket of
- 15 taxpayers. So that is very troubling. And I don't know
- 16 how you can provide standards for determining whether
- 17 this kind of transfer is based on anything reasonable.
- 18 MR. CLEMENT: Well, Justice Alito, let me
- 19 say that I don't think that you need any more standards
- 20 for the possibility of an upward departure than you need
- 21 for the possibility of a downward departure. And this
- 22 Court has already held in Farrar v. Hobby that the
- 23 results obtained is an adequate basis for departure, and
- 24 not a small departure. In Farrar v. Hobby, the lodestar
- 25 amount, the mechanical calculation that we're talking

- 1 about, was \$280,000. What was the reasonable attorney's
- 2 fee? This Court --
- JUSTICE SCALIA: Well, but wait. That's
- 4 pretty objective: Results obtained. I mean, if, you
- 5 know, the -- what was sought in the complaint was 100,
- 6 and in fact you got only 30, you are still a prevailing
- 7 party, but you shouldn't -- you shouldn't be compensated
- 8 as though you got everything that was sought. I think
- 9 that's much more objective than whether -- whether this
- 10 attorney is the best one I've seen in 28 years.
- I have another problem with it. I don't
- 12 like judges -- it's certainly not in the tradition of
- 13 the bench to comment upon the performance of lawyers. I
- 14 can't tell you how often I would like to give a separate
- 15 grade --
- 16 (Laughter.)
- 17 JUSTICE SCALIA: -- for the lawyer who won a
- 18 case. You know, one grade for the case and the other
- 19 for the lawyer. But we don't do that.
- 20 And if you do this going up, you've got to
- 21 do it going down. And you could expect the judge to
- 22 say: This is the worst performance I have seen in
- 23 28 years. Judges don't do that in our system, and I
- 24 don't think -- I don't think we should set up a
- 25 mechanism that induces them to do it.

- 1 MR. CLEMENT: Well, two things, Your Honor.
- 2 I mean, the results obtained is one of the two factors
- 3 that are at issue in this case. And I think results
- 4 obtained can be objective and be a basis for an upward
- 5 adjustment as well as a downward0 adjustment.
- As you heard the lawyer in the earlier case
- 7 say, you know, in a complaint, it is a wish list. And
- 8 it's a rare case where the attorney gets everything they
- 9 ask for in the complaint. This is that rare case where
- 10 everything that was asked for in the complaint was
- 11 obtained. That's one factor, Your Honor.
- 12 CHIEF JUSTICE ROBERTS: I will let you
- answer your second point, but just on that, I don't
- 14 understand the concept of extraordinary success or
- 15 results obtained. The results that are obtained are
- 16 presumably the results that are dictated or command or
- 17 required under the law. And it's not like, well, you
- 18 had a really good attorney, so I'm going to say the law
- 19 means this, which gives you a lot more, but if you had a
- 20 bad attorney I would say the law has this and so he
- 21 doesn't get a multiplier.
- The results obtained under our theory should
- 23 be what the law requires, and not different results
- 24 because you have different lawyers.
- MR. CLEMENT: Well, Mr. Chief Justice, I

- 1 mean, I defer to you, but I'm not sure that comports
- 2 with my experience. I have seen lawyers come into this
- 3 Court and concede a point in oral argument and I have
- 4 seen that prominently featured in this Court's opinion,
- 5 so it does seem to me that sometimes the quality of the
- 6 performance and the results obtained do depend on the
- 7 lawyer's performance and are not foreordained just by
- 8 the four corners of the complaint.
- 9 And so I think, again --
- 10 CHIEF JUSTICE ROBERTS: Well, but what does
- 11 a judge say when he said, you have achieved
- 12 extraordinary results. That if you weren't there, I
- 13 would have made a mistake on the law?
- MR. CLEMENT: No, I think what he says is
- 15 that in the hands of another counsel the relief that was
- 16 obtained might have been significantly less. This was
- 17 an enormous --
- 18 CHIEF JUSTICE ROBERTS: I guess that's
- 19 saying the same thing I said, which if it weren't for
- 20 how good you are I would have made a mistake.
- 21 MR. CLEMENT: Well, maybe not -- no, not how
- 22 good. How tenacious. I mean, this case settled. With
- 23 a different lawyer for the plaintiffs in this case than
- 24 --
- 25 CHIEF JUSTICE ROBERTS: Maybe we have a

- 1 different perspective. You think the lawyers are
- 2 responsible for a good result and I think the judges
- 3 are.
- 4 (Laughter.)
- 5 MR. CLEMENT: And maybe your perspective's
- 6 changed, Your Honor.
- 7 (Laughter.)
- 8 MR. CLEMENT: But I would think certainly in
- 9 the context of a consent decree, when to give up, when
- 10 to fight further, is going to be factored into the
- 11 results. And I think it's a fair point that a judge in
- 12 today's system, especially in the context of class
- 13 relief like this, sees a lot of cases that end up with a
- 14 coupon settlement that really doesn't do any good for
- 15 the class. They're --
- 16 JUSTICE ALITO: Maybe your perspective has
- 17 changed too, Mr. Clement. But your argument is that,
- 18 you know, for \$495 an hour you really can't get a good
- 19 lawyer? You need to have -- you need to pay more than
- 20 that?
- 21 MR. CLEMENT: Well, on that my perspective
- 22 has changed, Your Honor. But let me say two things.
- One is, less than 10 percent of the total
- 24 rates here, the total compensable hours here, were
- 25 top-of-the-market rates. Only the two lead counsel were

- 1 compensated, at sort of 495 and \$450 an hour.
- 2 If you want to talk about the -- the Lowry
- 3 declaration, which is one thing that Mr. Shah brought
- 4 up, what he quoted from was essentially the conclusion
- of that, where as part of the existing Eleventh Circuit
- 6 precedent that looks to prevailing rates in the Atlanta
- 7 market there is a recitation that that is the sort of
- 8 the prevailing rate consistent with the quality. That
- 9 is essentially something that the Eleventh Circuit
- 10 requires you to say.
- 11 I think the more relevant part of that
- 12 declaration is at Joint Appendix at page 35, where
- 13 Ms. Lowry points out that as a matter of fact these
- 14 rates in the Atlanta market do nothing to account for
- 15 the fact that she has to pay New York overhead, and that
- 16 her real rates are a national rate based on providing a
- 17 service that almost no one else in the country can
- 18 provide. It's a really unique --
- 19 JUSTICE BREYER: What is the overhead?
- MR. CLEMENT: What's that?
- 21 JUSTICE BREYER: What is the overhead? I
- 22 mean, that's something that I find interesting and
- 23 important and I can't find it anywhere. The numbers
- 24 began to bother me in the same way they did with Justice
- 25 Alito. I am thinking: There are 30,000 hours. They

- 1 got 10.5 million. That translates into, what is it,
- 2 \$350 an hour. Now, if the lawyer works for 2,000 hours
- 3 of the year, which is a little high, he is being
- 4 compensated at \$700,000 on average in this case. But he
- 5 has to pay overhead. So what's that? 40 percent? 30?
- 6 20?
- 7 MR. CLEMENT: Justice Breyer, the numbers
- 8 aren't broken down. But I can't tell you --
- 9 JUSTICE BREYER: Well, I mean, if you -- any
- 10 rough idea at all. Because I think if it's anywhere
- 11 near \$700,000 on average, you say to a taxpayer: You
- 12 are going to pay this, and that's more money than 99
- 13 percent of the taxpayers hope to see in their lives, and
- 14 suddenly they are paying that money to somebody, which
- is -- I could say: Okay, pay them \$400,000. That's
- 16 what he would get as the average fee for the toppest,
- 17 most top lawyer. And that's, you know, pretty high.
- 18 But \$700,000 a year for a lawyer. Wow. And that's what
- 19 this judge paid.
- Now, what is it that came out of that?
- 21 That's what I want to know before I make up my mind,
- 22 frankly. And I'm going to try to look it up, but I'm
- 23 trying -- I'm trying to get a rough idea here.
- MR. CLEMENT: Well, what I think you can say
- 25 for sure, Justice Breyer, is that what came out of that

- 1 is a lot more if you have your office in New York than
- 2 if you have your office in Atlanta. But --
- JUSTICE BREYER: That doesn't help me. And
- 4 the reason it doesn't help me is because if it's a very,
- 5 very high number in dollars per year, then I am tempted
- 6 to think: Well, very high is enough. You don't need
- 7 very, very, very high.
- 8 You see my point?
- 9 MR. CLEMENT: I do, Justice Breyer. But I
- 10 also think the question presented here is whether you
- 11 can ever have an enhancement.
- 12 JUSTICE BREYER: Yes. I would be saying:
- 13 Be satisfied forever with very, very high, the most top
- 14 pay that any top lawyer gets; do not want even more than
- 15 that.
- 16 And if in fact I doubt that I have really
- 17 made a difference to incentives on that one, for the
- 18 reason that the Solicitor General said -- and my
- 19 goodness, how do we explain this to the average person?
- 20 That -- those are the questions that are genuinely going
- 21 through my mind. I haven't made up my mind how I will
- 22 come out in this case. So it's not a kind of putting
- 23 this to you. I don't know.
- 24 MR. CLEMENT: Right. Well, Justice Breyer,
- 25 let me take issue, though, with the hypothetical that

- 1 all these lawyers are getting the top, top rate. That's
- 2 not -- that's not what is happening, either in this case
- 3 or in general.
- 4 And one of the things, if you look out at
- 5 the circuits, you will see that, because this Court has
- 6 always said that the lodestar method is a two-step
- 7 process, the first step, as this Court has repeatedly
- 8 described it, is an estimate. Because of that, the
- 9 circuits have some looseness as to how they go about
- 10 estimating the reasonable hourly rate. They do not say:
- 11 Let's take the tippy-tip-top rate and use that to
- 12 calculate the rate. They use a variety of formulas. As
- 13 I say, the Laffey index in the D.C. Circuit is quite
- 14 formulistic and doesn't -- it puts you in three-year
- 15 groups and doesn't change your compensation between your
- 16 8th and 11th year and your 12th and 20th year, so it's
- 17 very mechanical. In some circuits, you can get a
- 18 national rate. So in a circuit -- if this case would
- 19 have been litigated in Cincinnati in the Sixth Circuit
- then Ms. Lowry may have been able to get \$700 an hour,
- 21 which is a national rate. On the other hand, because
- 22 this was in Atlanta, she was able to get the prevailing
- 23 market rate in Atlanta, which was 495. Now --
- 24 CHIEF JUSTICE ROBERTS: Counsel, this lawyer
- 25 -- I'm sorry, this judge said they were extraordinarily

- 1 good, but where's the cutoff? If the judge said: This
- 2 is in the top ten lawyers I have ever seen, or the top
- 3 20, where do you get an enhancement and where do you
- 4 not?
- 5 MR. CLEMENT: Well, Mr. Chief Justice --
- 6 CHIEF JUSTICE ROBERTS: Yes, that's the
- 7 thing. It's hard to tell.
- 8 MR. CLEMENT: No, no. I don't mean to -- I
- 9 would start with this Court's cases that say it is to be
- 10 in a rare case. Now, they say that repeatedly, so I
- 11 take this Court at its word, and I would think that the
- 12 rare case might --
- 13 CHIEF JUSTICE ROBERTS: Well, for
- 14 28 years -- the judge was on the bench 28 years, right?
- 15 Well, if you are in the top 28, is that a
- 16 rare case or not? It's once a year.
- 17 MR. CLEMENT: Well -- but he had one case in
- 18 28 years, so, I mean, whatever the denominator is --
- 19 CHIEF JUSTICE ROBERTS: I know, but we are
- 20 trying --
- 21 MR. CLEMENT: -- it's a huge denominator.
- 22 CHIEF JUSTICE ROBERTS: We are trying to
- 23 establish a principle, and other judges are going to
- 24 have to follow this. And do they think, well, this was
- 25 really good, but it wasn't as good as that law firm or

- 1 lawyers we had three years ago, they were really good.
- 2 MR. CLEMENT: I mean, actually, I don't
- 3 think that's a crazy way to approach it, which is this
- 4 really is supposed to be something that is reserved for
- 5 the rare case. I am not --
- 6 CHIEF JUSTICE ROBERTS: And I assume -- how
- 7 long -- how does a judge, who is on the bench in his or
- 8 her first year, do this?
- 9 Well, this is the best lawyer I've had in
- 10 the eight months I have been here.
- 11 (Laughter.)
- 12 CHIEF JUSTICE ROBERTS: But how does he or
- 13 she know that that -- that may be as good as it gets,
- 14 for the next 28 years?
- 15 (Laughter.)
- MR. CLEMENT: Well, maybe the judge stays
- 17 his or her hand in the first year. I mean, this is a
- 18 discretionary judgment. There is an element of
- 19 discretion in this, that starts with statutory facts --
- 20 which is may, not must -- and this Court has recognized
- 21 time and time again --
- JUSTICE SCALIA: You say discretion. I say
- 23 randomness. I mean, that is not a matter of discretion.
- 24 It is a matter of randomness. How, how long has the
- judge who observed this case been on the bench?

- If he has been there just a couple of years,
- 2 kiss good-bye to your -- your extra money for being
- 3 excellent. That's random. That's not discretion.
- 4 MR. CLEMENT: Well, no, I think it's a
- 5 discretionary judgment. I mean, the -- the district
- 6 courts are going to be exercising that discretion guided
- 7 by what this Court has said.
- 8 This Court has said it should be the rare
- 9 case in which there is an enhancement. I think they are
- 10 entitled to take, this Court, at its word, and I think
- 11 there is a reason, by the way, as this Court has
- 12 rejected enhancement based on other factors, that it has
- 13 always held out the possibility for the enhancement, in
- 14 the rare case, for the quality of service and the
- 15 excellence of results.
- 16 The reason is, if you take that off the
- 17 table, then the statute becomes unrecognizable to the
- 18 Congress that passed it. This is not a difficult
- 19 question about whether the Congress that passed the
- 20 statute intended for there to be bonuses or enhancements
- 21 based on exceptional quality and results.
- Those of you that looked to legislative
- 23 history, in this context of interpreting this statute,
- 24 have repeatedly looked to the Senate report. The Senate
- 25 report provides three exemplary cases as to how you

- 1 should correctly apply an attorney's fee.
- 2 Two of those three cases applied
- 3 enhancements based on exceptional performance and --
- 4 JUSTICE SCALIA: So you want this Court to
- 5 look to those cases -- you know, it's the world turned
- 6 upside down. Instead of the lower courts reading our
- 7 cases, we have to read lower court cases to decide what
- 8 this statute means. Is that it?
- 9 MR. CLEMENT: Well, two -- two responses,
- 10 Justice Scalia.
- JUSTICE SCALIA: I don't do that.
- 12 MR. CLEMENT: I know you don't, and I know
- 13 that because I read your dissent -- or your
- 14 concurrence --
- 15 JUSTICE SCALIA: Yes.
- 16 MR. CLEMENT: -- in Blanchard. The rest of
- 17 the Court did that in Blanchard, and I think it
- 18 continued to do that because you are interpreting a word
- 19 like reasonable, and I think have you to look somewhere
- 20 in the -- and the Senate report provides guidance.
- 21 The second thing though is, Justice Scalia,
- 22 you, in a number of contexts, have pointed out that, if
- 23 you don't look to legislative history, it's okay to look
- 24 at how a term was interpreted by courts at the time that
- 25 Congress adopted it.

- 1 And that's another way to get at the same
- 2 result, which is, in this is case --
- JUSTICE BREYER: Should I -- should I look
- 4 at the fact that, in the early 1970's, when this was
- 5 done, legal fees were not quite so high? And perhaps,
- 6 comparatively so, they weren't quite so high, either.
- 7 MR. CLEMENT: Well, Justice Breyer, I would
- 8 say that -- you know, you can look to the fact that we
- 9 have had a lot of inflation since then. You can make
- 10 the --
- 11 JUSTICE BREYER: Not just inflation. I
- 12 think the discrepancy between these top legal fees and
- 13 the fee of the average person -- or the work of the
- 14 average person, the average wage for a family of four
- 15 has changed quite a lot. I suspect that's true.
- But I could look it up. But should I look
- 17 it up?
- 18 MR. CLEMENT: I don't think you should
- 19 because, again, what Congress said it was trying to do
- 20 here was not to try to make people indifferent between
- 21 whether they became lawyers or not.
- They were looking at lawyers and they were
- 23 trying to determine, we want to essentially make you
- 24 indifferent between engaging in civil rights work and
- 25 other complex civil litigation, like antitrust, and if

- 1 that --
- 2 JUSTICE SCALIA: Of course, this statute was
- 3 passed before we adopted the lodestar approach, wasn't
- 4 it?
- 5 MR. CLEMENT: Before you adopted the
- 6 lodestar, sure.
- JUSTICE SCALIA: Before this --
- 8 MR. CLEMENT: But not before the lower
- 9 courts had adopted the lodestar, and which way that cut,
- 10 I think that cuts very strongly against adopting a rule
- 11 that says, the lodestar is not just a guiding principle,
- 12 but is an absolute ceiling on the award.
- 13 JUSTICE SCALIA: No. I would think it cuts
- 14 the other way. Congress was not contemplating that we
- 15 would adopt approach -- an approach which takes into
- 16 account the excellence of counsel.
- 17 MR. CLEMENT: Well, again, Your Honor, with
- 18 respect, I don't think, in any direct way, the lodestar
- 19 takes into account the quality of counsel. Prevailing
- 20 market rates, as Justice Stevens indicated, win or lose,
- 21 those are the prevailing market rates.
- So I don't think it directly takes it into
- 23 account, and the question here is whether you can ever
- 24 take that into account.
- 25 And I actually think, if you are looking for

- 1 quidance, you can look to the early Third Circuit cases
- 2 that were decided before Congress passed the statute,
- 3 and what those Third Circuit cases decided -- there was
- 4 an en banc case, Lindy II, by Judge Aldisert and a panel
- 5 opinion in Merola by Judge Garth.
- And what those decisions did, is they said
- 7 the great thing about having a lodestar with adjustments
- 8 is that, in the mine run of cases, the rates are going
- 9 to get quality of performance results about right.
- But what they --
- 11 JUSTICE ALITO: But you, yourself, make the
- 12 point in your brief that the -- that legal fees are
- 13 changing. And do you think that is relevant? Are they
- 14 going up? Or are they going down now?
- MR. CLEMENT: Well, I think, right now, they
- 16 are sort of, at best, staying stagnant and maybe going
- 17 down a little bit. I think this Court has always looked
- 18 to the market in setting rates a bit.
- 19 I think the main thing -- the fact that
- 20 rates are not going up, in sort of an inevitable cycle,
- 21 suggests to me, is that this Court has to recognize that
- the one basis for enhancement that it has already
- 23 consistently recognized, which is an enhancement for
- 24 delay, which is not the same thing as contingency.
- 25 This Court recognized that enhancement for

- 1 delay was appropriate in the case of Missouri v.
- 2 Jenkins. Now, this Court indicated that you can take
- 3 account for delay, either through current rates, instead
- 4 of historical rates, or through an enhancement.
- I think the one thing we know now is that we
- 6 have to be careful about using current rates to take
- 7 into account for delay because the assumption that that
- 8 would work was based on this assumption that rates
- 9 inevitably go up.
- 10 CHIEF JUSTICE ROBERTS: There is a flip side
- 11 to the unpopular case situation that you talked about,
- 12 which is lawyers and law firms sometimes take on a
- 13 particular high profile case to increase their profile,
- 14 and they would have done it for a lot less.
- 15 We have lawyers who argue here, who are
- 16 doing it for free, because it's a big deal to be
- 17 recognized as doing something in the Supreme Court. So
- 18 when you use prevailing rates with respect to that type
- 19 of work, you are overcompensating them.
- MR. CLEMENT: Well, and maybe that's right,
- 21 and maybe there should be adjustment in those cases.
- 22 Maybe you shouldn't just take the prevailing rate for
- 23 the general provision of services.
- You should take into account that, actually,
- 25 you have lawyers here who are willing to do it for free.

- 1 Sometimes, I think you get what you pay for, but that's
- 2 a different subject.
- 3 (Laughter.)
- 4 MR. CLEMENT: I do think that you can make
- 5 adjustments, and that is what -- think about the term,
- 6 the lodestar. I mean, the lodestar is not a
- 7 destination. It's not a complete calculation. The
- 8 lodestar is a guiding light. It gets you --
- 9 CHIEF JUSTICE ROBERTS: Well, it's also not
- 10 the term Congress used.
- 11 MR. CLEMENT: It's not, but if you want to
- 12 resort to what Congress had in mind, I think that only
- 13 favors the idea that you would have adjustments upward
- 14 and downward.
- 15 CHIEF JUSTICE ROBERTS: I want to resort to
- 16 what Congress said, which was --
- 17 MR. CLEMENT: And the term is reasonable,
- 18 and, again, I think, if you were looking for fertile
- 19 ground to derive a bright-line rule that you never, ever
- 20 have an enhancement for --
- 21 JUSTICE SOTOMAYOR: Aren't you -- most of
- 22 your arguments are suggesting that the counter -- that
- 23 your adversary is now limiting, that the adjustment
- 24 should be made -- tied to something, and that something
- 25 would be the actual rate.

1 And most of the factors you are talking 2 about -- whether the person's a national attorney with 3 overhead or whether that person's a -- has done better 4 work -- the example I used, a second-year associate, 5 could be adjusted just in the rate. And that would give you a grounded place to 6 7 make a judgment about the exercise of a court's discretion. Why isn't that a more structured, more --8 9 MR. CLEMENT: Well, I guess what I would 10 say, Justice Sotomayor, is that that potentially could 11 be more structured. I'm not sure it inherently is, 12 which is to say I think -- you know, in some ways, it 13 may be more transparent to say, we are just going to use 14 the Laffey Index, or we are going to use the prevailing 15 market rates, and then we are really going to hone in on 16 the issue of quality and exceptional results after the 17 fact. 18 I think, if the Court wants to suggest that 19 you should take those factors into account in setting the rate -- and the rate should not be just a rigidly 20 21 calculated rate that comes from an index or comes from 22 the prevailing market. 23 I think the one thing I would very much want to urge on you is, if you take that route, that you 24 25 allow a remand for an opportunity for my clients to make

- 1 that showing to the district court because there is no
- 2 question, from the record here, that they were
- 3 responding to extant law of the Eleventh Circuit.
- 4 And that extant law did not provide that
- 5 possibility for adjustment with the prevailing market
- 6 rate.
- 7 JUSTICE GINSBURG: But Mr. Cohen said that
- 8 that would be a very limited adjustment. He wasn't
- 9 contemplating in his suggestion in his brief that you
- 10 could go outside what the associate would get; you just
- 11 go to the top. Let's say it could be 200 to 400, you
- 12 give them 400, but you don't give them 500. Justice
- 13 Alito asked -- he was concerned about standard list
- 14 enhancements, so one question is when do you enhance?
- 15 Another is, in this case it was 75 percent; how do you
- 16 know what's the right multiplier?
- 17 That -- the concern is you are going to have
- 18 variations from district judge to district judge in how
- 19 good the performance was, in what is the appropriate
- 20 multiplier, are there any handles that would prevent
- 21 this from becoming just random -- just -- rudderless.
- 22 MR. CLEMENT: Well, Justice Ginsburg, first
- 23 let me say that I had understood, and perhaps this was
- 24 wishful thinking, but I had understood that Justice
- 25 Sotomayor was suggesting the possibility of a broader

- 1 inquiry at the rate-setting stage, not just a narrow
- 2 focus sort of within bands. So I just -- that's what I
- 3 was trying to respond to.
- 4 As to trying to cabin the discretion, let me
- 5 try to offer some thoughts about cabining the
- 6 discretion, but let me also say that, to paraphrase
- 7 Justice Scalia, what is sauce for the goose is sauce for
- 8 the gander. I mean, this Court has said that there are
- 9 bases for downward departures, and including downward
- 10 departures all the way to zero in Farrar v. Hovey, and
- 11 the Court has not been overly concerned about cabining
- 12 that discretion.
- 13 And that kind of discretion goes on downward
- 14 all the time. It can take place in terms of looking at
- 15 a particular motion and saying that wasn't a very good
- 16 motion; you were wasting your time; there are a variety
- of ways that can be taken into account downward, and
- 18 this Court hasn't felt that concerned about cabining the
- 19 discretion.
- Now if this is Court wants to cabin the
- 21 discretion, I think certainly there is two factors to
- 22 it: there is the quality of service and there is the
- 23 exceptional results. As to the quality of service, I
- 24 would certainly said that you ought not to have a rigid
- 25 rule, which is essentially what Petitioners are asking

- 1 for, that would cap it with prevailing market rates.
- 2 There ought to be some flexibility for that,
- 3 for the judge to take into account the actual experience
- 4 that the judge has with the lawyers in the courtroom.
- 5 The second thing I would say is that I do
- 6 think it ought to be fair. If you are going to do this
- 7 kind of calculation that you don't base it on something
- 8 like the Laffey Index, and you don't base it on a rule
- 9 that a national expert can never get a national
- 10 prevailing rate, but even though they are sitting in New
- 11 York, they have to get the top rate only in the Atlanta
- 12 market. I think those differences should be taken into
- 13 account on the compensation side of things.
- 14 And then if at some point the judge wants to
- 15 say, and I want to give either this rate or this
- 16 multiplier for the quality of the performance, then
- 17 that's something that you can certainly assess. As to
- 18 the exceptional results, I also think thereto, you can
- 19 focus on specific factors of the case before you and you
- 20 can -- it.
- Now I would say, for example in this case,
- 22 part of the reasons the results are exceptional, I would
- 23 point to three things. One is the advance of capital
- 24 here in order to take on a case of this breadth and
- 25 undertaking is really an exceptional undertaking. If

- 1 you look at the Goldberg declaration at joint appendix
- 2 75, that declaration points out that a smaller firm
- 3 would have essentially been bankrupted by this case.
- 4 JUSTICE KENNEDY: Were -- were expert
- 5 witness fees reimbursable in this case, under -- under
- 6 the statute? I noticed they were cut down but I didn't
- 7 know if he cut out all of them or just part of them.
- 8 MR. CLEMENT: The district judge cut -- cut
- 9 off all of them following this Court's decision in
- 10 Casey, Your Honor.
- 11 JUSTICE KENNEDY: All right.
- 12 MR. CLEMENT: There was still, though, I
- should say, something on the order of \$750,000 in
- 14 reimbursable expenses that had to be advanced. It is
- 15 worth pointing out that one factor that Judge Shoob took
- 16 into account in giving an enhancement here was the delay
- in pavement. That is a permissible factor under
- 18 Missouri v. Jenkins and even if you use current rates
- 19 that doesn't do anything to compensate you for the delay
- 20 in reimbursement.
- 21 CHIEF JUSTICE ROBERTS: Well, I think it
- 22 does. I think rates are set with -- based on a law
- 23 firm's record of -- I mean, just because you bill a
- 24 client doesn't mean that they are going to pay or that
- 25 they are going to pay at what you billed them. And I

- 1 think the rates are set to take into account that over
- 2 the past year, whatever, you have the realization rate
- 3 of -- whatever, 80 percent or 85 percent.
- 4 MR. CLEMENT: Oh, I am just making a narrow
- 5 point, Mr. Chief Justice, which is the current rates
- 6 don't take into account the fact that there was a delay
- 7 in repayment for reimbursable expenses. Some of these
- 8 expenses were paid out four years ago, I mean at the
- 9 time of fee calculation. You don't get sort of, you
- 10 know, today's copying expenses or today's Fed Ex
- 11 expenses. You get the expenses at the time you did
- 12 them, and you don't get any prejudgment interest on
- 13 that. So that is one thing Judge Shoob thought ought to
- 14 be compensated here.
- 15 Again, that is one factor that makes this
- 16 exceptional. Another factor is that this was an
- 17 entrenched problem that they were dealing with. In 1989
- 18 the foster care child system in Georgia was described as
- 19 a crisis; by 1986 it had been upgraded to a catastrophe.
- 20 This is a very difficult problem.
- 21 The last thing is the scope of the relief,
- 22 which really is I think very broad here and that's what
- 23 Judge Shoob was recognizing. And as I said earlier, I
- 24 do think in an era of coupon settlements, a judge is
- 25 entitled to look at a case like this and say this is

- 1 really a remarkable result that has been achieved here,
- 2 and the normal rates, normal prevailing market rates
- 3 don't compensate for this kind of result.
- 4 So I do think there are things that the
- 5 Court could point to in this case or in other cases to
- 6 try to cabin that discretion. I do think, though, that
- 7 discretion is an inherent feature of this statutory
- 8 regime and this Court has tolerated a degree of
- 9 discretion in a variety of contexts including with
- 10 respect in the area of downward departures.
- I do want to get, before I sit down, this
- 12 point about getting the incentives right, because one
- 13 thing that Congress was clearly very concerned about was
- 14 getting the incentive rights for counsel. And if you
- 15 accept Petitioner's position that the lodestar is a
- 16 ceiling and not something that is subject to adjustment
- 17 up or down, then what you are telling lawyers is the
- 18 that the maximum amount they can make in a civil rights
- 19 case is the minimum amount they can make in a different
- 20 case, where by the way they will get paid every 30 days
- 21 and their expenses will get reimbursed in real time.
- Then you are also telling them something
- 23 else, which is, that's actually just the starter because
- 24 there are multiple ways for district courts to cut down
- 25 on the lodestar amount, either because you spent too

- 1 much time on this or we didn't like your travel
- 2 expenditures. And so there are multiple ways for those
- 3 hours to be cut down.
- If you accept Petitioner's rule and there is
- 5 no way to get those rates bumped up in any circumstances
- 6 then you are basically guaranteeing that as I say the
- 7 maximum you can make in a civil rights is the minimum
- 8 you can make in any other kind of case.
- 9 CHIEF JUSTICE ROBERTS: Well, but there --
- 10 general counsel do that all the time when they get a
- 11 bill from a law firm. They cut it down. They say you
- 12 spent too much time with this associate only because he
- or she is a first year associate and is learning the
- 14 training; I'm not going to pay for that.
- MR. CLEMENT: Two things.
- 16 CHIEF JUSTICE ROBERTS: So it's the same--
- it's the same thing that happens when a district court
- 18 looks at the -- the lodestar and cuts it down.
- 19 MR. CLEMENT: Two things, Mr. Chief Justice,
- 20 one it's the law of the Eleventh Circuit and every
- 21 circuit that before submitting your fees to the court
- 22 you are supposed to use billing judgment to take care of
- 23 some of those things, approximating maybe what your
- 24 client would do for you. But second, and I think more
- 25 tellingly, the client may do that to you. The client

- 1 doesn't have the help of your opposing counsel to egg
- 2 them on and give them suggestions, and that's what a
- 3 district court does in the context of one of these
- 4 cases.
- 5 So I really think as a practical matter you
- 6 are systematically undercompensating counsel. And I
- 7 mean, if you want to take into account practicalities, I
- 8 am not here to reargue the Dague case, but if you want
- 9 to talk about practicalities the fact that all of these
- 10 cases are contingency cases and the rational market for
- 11 those would be much higher than -- if you are worried
- 12 about sort of windfalls for plaintiffs's counsel in
- 13 these kind of cases, you really can worry about
- 14 something else, with all due respect, because the
- 15 combined effect of Dague and Casey makes it very
- 16 difficult to sort of get comparable compensation.
- 17 As I say, I am not here to reargue these
- 18 cases. I do think frankly, Daque, is distinguishable
- 19 because there, you had the prevailing party language.
- 20 The other thing about Dague that is distinguishable that
- 21 I will say before I sit down is one of this Court's
- 22 concerns in Dague was creating an asymmetry. Blanchard
- 23 had already said that contingency fees could not cap
- 24 your awards; they didn't want to have an asymmetrical
- 25 system. That's exactly what Petitioners are asking you

- 1 for, is a completely asymmetrical system. Farrar v.
- 2 Hovey you can reduce downwards based on exceptionally
- 3 poor results. There would be no basis whatsoever to
- 4 even adjust a little bit under their rule for
- 5 exceptional results on the upside.
- 6 Thank you.
- 7 CHIEF JUSTICE ROBERTS: Thank you Mr.
- 8 Clement.
- 9 Mr. Cohen, you have four minutes.
- 10 REBUTTAL ARGUMENT OF MARK H. COHEN
- ON BEHALF OF THE PETITIONERS
- MR. COHEN: Than you, Your Honor.
- 13 I would like to start out with the little
- 14 joke that Mr. Clement made, is that you get what you pay
- 15 for? You do get what you pay for, is -- because I am
- 16 getting paid half my hourly rate in this case means I
- 17 half of what I would do for another client who would pay
- 18 my full rate? No. Because my professional
- 19 responsibility is that when I am hired by a client for
- 20 an hourly rate I am supposed to represent that client
- 21 zealously within the bounds of the law.
- 22 So to say that in a case like this that
- 23 these lawyers would have done a different type of job
- 24 had they not known there was a possibility of a quality
- 25 enhancement is an insult, frankly, to Ms. Lowery and her

- 1 group, because they do this all the time. They do it
- 2 without getting an enhancement; they never asked for one
- 3 before. And clearly if this Court determines that a
- 4 quality enhancement is going to be available even in
- 5 rare or exceptional circumstances, you are going to have
- 6 arbitrary results and you are going to have
- 7 inconsistency which the analytical part of the lodestar
- 8 guards against.
- 9 Second point I would make is that Mr.
- 10 Clement mentioned about the New York rates and the
- 11 overhead. That was not the rationale for the district
- 12 court's awarding a quality or an enhancement here. That
- 13 was not part of it at all.
- 14 Getting back to what the Court has
- 15 mentioned: "The best lawyer I have ever seen." Look at
- 16 what the purpose of this fee-shifting statute is. It's
- 17 to attract competent counsel by awarding them a
- 18 reasonable fee. What attorney is going -- who wouldn't
- 19 normally take a civil rights case is going to say:
- 20 Maybe I will take it, because maybe the judge will say
- 21 I'm the best he's ever seen or one of the best I've ever
- 22 seen? It's not a rational reason to give out there to
- 23 attract competent counsel. Counsel are going to take a
- 24 civil rights case because they know if they prevail they
- 25 are going to get their prevailing market rate, they are

- 1 going to get all their hours, their reasonable number of
- 2 hours, put in. In this case, it was 25,000 hours over a
- 3 three-year period. And they got their reasonable rates.
- 4 The judge also double-counted for quality
- 5 because Ms. Lowry got a \$495 rate in part because of
- 6 her, quote, "stellar performance," as the district judge
- 7 decided. So to count that again by giving an
- 8 enhancement is impermissible double-counting, as this
- 9 Court has held in previous cases, including Delaware
- 10 Valley.
- 11 Finally, I would say that the district
- 12 judge's order in this case, if left undisturbed, will
- 13 create additional applications for enhancements and
- 14 whether they are granted or not, as Justice O'Connor
- 15 pointed out in the Delaware Valley II case in her
- 16 concurrence, it's not the issue of the rarity of the
- 17 granting of the enhancement. The issue is the
- 18 requesting of it. And the requests are going to come
- 19 out the wazoo, and district courts are going to be
- 20 deciding things arbitrarily and on different bases.
- 21 And for those reasons, we would respectfully
- 22 urge this Court to reverse.
- JUSTICE STEVENS: May I ask this final
- 24 question? We have a question of law before us, whether
- 25 there is an absolute ceiling here.

- 1 Am I justified in assuming that if we could
- 2 reach the question of whether it was a reasonable
- 3 enhancement, there is no argument about that?
- 4 MR. COHEN: I'm sorry, Your Honor, if you
- 5 determine that the enhancement was --
- 6 JUSTICE STEVENS: We are assuming for
- 7 purposes of decision that the enhancement was
- 8 reasonable, if that was -- if it's ever available,
- 9 because you are not challenging the amount. In other
- 10 words, you are making an argument of law. Even if they
- 11 give them a \$10 enhancement it would be exactly the same
- 12 issue before us.
- MR. COHEN: We are arguing that the
- 14 enhancement in this case was unreasonable, Your Honor,
- 15 and --
- 16 JUSTICE STEVENS: That is not the question
- 17 presented in the cert petition.
- 18 MR. COHEN: Well, no, I understand that.
- 19 JUSTICE STEVENS: If I understand it, the
- 20 question of law presented is that even if the
- 21 enhancement had only been \$1,000, you would say that was
- 22 equally wrong.
- MR. COHEN: That's correct. For quality or
- 24 result. For those two factors.
- 25 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

1	The case is submitted.				
2	(Whereupon, at 12:12 p.m.,	the	case	in	the
3	above-entitled matter was submitted.)				
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